

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

TAMMY R.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

Case No. C19-5966 RSM

**ORDER REVERSING AND  
REMANDING FOR FURTHER  
ADMINISTRATIVE  
PROCEEDINGS**

Plaintiff appeals denial of her applications for Supplemental Security Income and Disability Insurance Benefits, contending the ALJ erred by discounting her testimony, two medical opinions, and three lay witness statements, and failing to account for all severe impairments. Dkt. 12. As discussed below, the Court **REVERSES** the Commissioner's final decision and **REMANDS** the matter for further administrative proceedings under sentence four of 42 U.S.C. § 405(g).

**BACKGROUND**

Plaintiff is 51 years old, has a high school education, and has no past relevant work. Dkt. 10, Admin. Transcript (Tr.) 46. Plaintiff applied for benefits in August 2016, alleging disability as of May 1, 2016. Tr. 36. After conducting a hearing in May 2018, the ALJ issued a decision finding Plaintiff not disabled. Tr. 146-79, 36-48.

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1 **THE ALJ'S DECISION**

2 Using the five-step disability evaluation process outlined in 20 C.F.R. §§ 404.1520,  
3 416.920, the ALJ found:

4 **Step one:** Plaintiff has not engaged in substantial gainful activity since the alleged onset  
5 date.

6 **Step two:** Plaintiff has the following severe impairments: obesity, osteoarthritis of the  
7 bilateral knees, rheumatoid arthritis of the bilateral hands, degenerative disc disease,  
8 depression, and anxiety.

9 **Step three:** These impairments do not meet or equal the requirements of a listed  
10 impairment under 20 C.F.R. Part 404, Subpart P, Appendix 1.

11 **Residual Functional Capacity:** Plaintiff can perform light work and can occasionally  
12 stoop, kneel, crouch, crawl, and climb ladders, ropes, and scaffolds; frequently climb  
13 ramps and stairs; and frequently reach overhead with the dominant right arm. She must  
14 avoid concentrated exposure to hazards. She can complete simple routine tasks and  
15 occasionally interact with others.

16 **Step four:** Plaintiff has no past relevant work.

17 **Step five:** As there are jobs that exist in significant numbers in the national economy that  
18 Plaintiff can perform, she is not disabled.

19 Tr. 38-48.

20 **DISCUSSION**

21 This Court may set aside the Commissioner's denial of Social Security benefits only if  
22 the ALJ's decision is based on legal error or not supported by substantial evidence in the record  
23 as a whole. *Trevizo v. Berryhill*, 871 F.3d 664, 674 (9th Cir. 2017).

**A. Plaintiff's Testimony**

Where, as here, an ALJ determines a claimant has presented objective medical evidence  
establishing underlying impairments that could cause the symptoms alleged, and there is no  
affirmative evidence of malingering, the ALJ can only discount the claimant's testimony as to

1 symptom severity by providing “specific, clear, and convincing” reasons supported by  
2 substantial evidence. *Trevizo*, 871 F.3d at 678. The ALJ discounted Plaintiff’s symptom  
3 testimony, including difficulty using her hands, inability to stand or walk for long, and memory  
4 and focus problems, as inconsistent with her activities and the medical evidence. Tr. 41-43.

5 An ALJ may discount a claimant’s testimony based on daily activities that either  
6 contradict her testimony or meet the threshold for transferable work skills. *Orn v. Astrue*, 495  
7 F.3d 625, 639 (9th Cir. 2007). The ALJ cited driving to appointments, heating food in the oven  
8 or microwave, dressing herself, and doing “some cleaning and crafts,” but failed to explain how  
9 these activities contradict Plaintiff’s testimony. Tr. 43. Plaintiff testified she can perform these  
10 activities with limits, for example taking “a couple of breaks” while washing dishes or knitting  
11 for only “a little bit [before her] fingers start to cramp.” Tr. 161, 157. These activities do not  
12 contradict her testimony. The ALJ also cited playing video games with her grandchild who has a  
13 seizure disorder and “spend[ing] time” with her young grandchildren. Tr. 43, 766. Nothing in  
14 the record suggests video game playing to such a degree that it contradicts Plaintiff’s testimony  
15 that arthritis limits what she can do with her hands. Tr. 154. Spending time does not contradict  
16 Plaintiff’s testimony. The ALJ erred by discounting Plaintiff’s testimony based on activities.

17 An ALJ may reject a claimant’s symptom testimony when it is contradicted by the  
18 medical evidence, but not for mere lack of supporting medical evidence. *See Carmickle v.*  
19 *Comm’r, Soc. Sec. Admin.*, 533 F.3d 1155, 1161 (9th Cir. 2008) (“Contradiction with the medical  
20 record is a sufficient basis for rejecting a claimant’s subjective testimony.”); *Burch v. Barnhart*,  
21 400 F.3d 676, 681 (9th Cir. 2005) (“lack of medical evidence cannot form the sole basis for  
22 discounting pain testimony”). The Commissioner contends records the ALJ cited contradict  
23 Plaintiff’s testimony. Dkt. 14 at 12. But findings such as normal gait across a doctor’s office do

1 not contradict testimony she cannot stand or walk for long. *Id.* at 13. Plaintiff reported  
2 decreased hand pain with methotrexate injections, but testified injections were stopped “because  
3 it was starting to cause problems with [her] liver.” Tr. 155, 840. Plaintiff had “good long-term  
4 memory” and “fair” short-term memory, and “fair” concentration. Tr. 589, 769, 508. The  
5 Commissioner shows no contradiction with her report she can pay attention for “very short  
6 periods like 5 minutes” and follow instructions but “forget[s] some of them.” Tr. 365.  
7 Moreover, the ALJ apparently accepted some memory and concentration limitations, restricting  
8 Plaintiff to “simple routine tasks.” Tr. 41. Conflict with medical evidence was not a clear and  
9 convincing reason to discount Plaintiff’s testimony.

10 The ALJ erred by discounting Plaintiff’s testimony without a clear and convincing  
11 reason.

## 12 **B. Lay Witness Statements**

13 The ALJ discounted the statement of Plaintiff’s daughter “for the same reasons” he  
14 discounted Plaintiff’s testimony. Tr. 45. The ALJ failed to address the statements of Plaintiff’s  
15 friends. The Commissioner contends the failure was harmless error because reasons the ALJ  
16 gave to discount Plaintiff’s testimony provide sufficient reasons to discount theirs. Dkt. 14 at  
17 14-15. Because the ALJ erred in discounting Plaintiff’s testimony, the ALJ also erred by  
18 discounting or failing to address the lay witness statements.

## 19 **C. Step Two**

20 A medically determinable impairment “must be established by objective medical  
21 evidence from an acceptable medical source.” 20 C.F.R. §§ 404.1521, 416.921. Impairments  
22 are severe if they “significantly limit” a claimant’s “physical or mental ability to do basic work  
23 activities.” 20 C.F.R. §§ 404.1522(a), 416.922(a). Plaintiff contends the ALJ erred by excluding

1 Crohn's disease, carpal tunnel syndrome, right shoulder osteoarthritis, obstructive sleep apnea,  
2 and migraines as severe medically determinable impairments. Dkt. 12 at 12-14.

3 The ALJ found Crohn's disease non-severe because it did not impose more than minimal  
4 limitations on Plaintiff's ability to work. Tr. 39. Substantial evidence supports the ALJ's  
5 finding, despite Plaintiff's argument that the disease may recur in the future. Plaintiff testified  
6 her Crohn's disease was in remission and causing "no ... major issues." Tr. 153-54.

7 The ALJ found carpal tunnel syndrome was not a medically determinable impairment  
8 because no objective medical evidence established Plaintiff had it. Tr. 39. Plaintiff fails to  
9 identify any such objective medical evidence in the record, and Plaintiff's vague argument that  
10 the lack of such evidence "should be only the beginning of the analysis, not the end" fails to  
11 show any harmful error. Dkt. 12 at 13.

12 Plaintiff also fails to identify any objective medical evidence establishing migraines or  
13 obstructive sleep apnea and thus fails to show the ALJ erred by not including them at step two.

14 The record contains objective medical evidence from an acceptable medical source of a  
15 right shoulder impairment. Brodie Wood, M.D., assessed moderate glenohumeral osteoarthritis  
16 of the right shoulder based on X-ray results. Tr. 827. He found Plaintiff had pain with  
17 "[f]orward [e]levation." *Id.* However, an ALJ's failure to properly consider an impairment at  
18 step two may be harmless where the ALJ considered the functional limitations caused by that  
19 impairment later in the decision. *Lewis v. Astrue*, 498 F.3d 909, 911 (9th Cir. 2007). The ALJ  
20 limited Plaintiff to frequent overhead reaching with her right arm and lifting 20 pounds  
21 maximum and 10 pounds frequently. Tr. 41. On remand, in light of a reevaluation of Plaintiff's  
22 testimony, the ALJ should assess whether these limitations adequately account for her right  
23 shoulder impairment.

**D. Medical Opinions**

**1. Terilee Wingate, Ph.D.**

ALJ may only reject the contradicted opinion of an examining doctor by giving “specific and legitimate” reasons. *Revels v. Berryhill*, 874 F.3d 648, 654 (9th Cir. 2017). The ALJ rejected Dr. Wingate’s opined “marked social limitations” as conflicting with Plaintiff’s activities of going to church and visiting friends and family. Tr. 45. The only marked limitations Dr. Wingate opined were in maintaining punctual attendance, maintaining appropriate behavior at work, and completing a normal work day and work week without interruptions from psychologically based symptoms. Tr. 767. These opinions are not contradicted by the cited activities.

The Commissioner offers improper *post hoc* arguments on which the Court cannot rely. *See Bray v. Comm’r of Soc. Sec. Admin.*, 554 F.3d 1219, 1225 (9th Cir. 1995). Dkt. 14 at 4-5.

The Court concludes the ALJ erred by discounting Dr. Wingate’s opinions.

**2. Nancy Armstrong, ARNP**

An ALJ may reject the opinion of a non-acceptable medical source, such as a nurse practitioner, by giving reasons germane to the opinion. *Ghanim v. Colvin*, 763 F.3d 1154, 1161 (9th Cir. 2014). Ms. Armstrong opined Plaintiff’s neck and back pain with sciatica, right shoulder arthritis, and Crohn’s disease markedly limited all exertional and postural movements, and she was unable to meet even the demands of sedentary work. Tr. 774-75. The ALJ gave these opinions little weight as “not supported by” examination findings such as normal gait and leg strength, no visible swelling or bruising, and normal lateral spinal range of motion. Tr. 45.<sup>1</sup>

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<sup>1</sup> The ALJ also discounted Ms. Armstrong’s opinion Plaintiff’s “anxiety/Depression/PTSD” markedly limited seeing, hearing, and communicating, but Plaintiff does not challenge this conclusion. Tr. 774, 45.  
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1 The record does not, however, indicate that such findings conflict with Ms. Armstrong's  
2 opinions. For example, the ALJ did not explain why bruising would be expected with arthritis or  
3 sciatica. Normal leg strength does not undermine assessments of neck, back, and shoulder  
4 impairments. Without more, the medical evidence the ALJ cited does not contradict Ms.  
5 Armstrong's opinions. The ALJ erred by discounting Ms. Armstrong's opinions.

6 **3. Renee Eisenhauer, Ph.D.**

7 Nonexamining State agency psychologist Dr. Eisenhauer opined Plaintiff's impairments  
8 would "reduce sustained concentration and stress tolerance," but not enough to prevent her doing  
9 "simple activities within an average schedule the majority of the time within customary  
10 tolerances." Tr. 202. The ALJ rejected this opinion, yet accommodated concentration  
11 restrictions by limiting Plaintiff to simple routine tasks, only occasional interaction with others,  
12 and no hazards. Tr. 41. Plaintiff fails to show any further limitation is required by Dr.  
13 Eisenhauer's opinion, and thus fails to show the ALJ harmfully erred in rejecting it.

14 Plaintiff also argues the ALJ erred by accepting the remaining State agency doctors'  
15 opinions. An ALJ is not required to provide reasons in support of accepting a medical opinion.  
16 *Turner v. Comm'r of Soc. Sec. Admin.*, 613 F.3d 1217, 1223 (9th Cir. 2010). However, because  
17 the ALJ must reevaluate Dr. Wingate's and Ms. Armstrong's opinions, the ALJ may also need to  
18 reevaluate the nonexamining doctors' opinions that conflict with them.

19 **E. Scope of Remand**

20 Plaintiff asserts her testimony and Dr. Wingate's and Ms. Armstrong's opinions should  
21 be credited as true and the Court should remand for benefits. Dkt. 12 at 17. Plaintiff's approach  
22 relies on "an erroneous reading of [Ninth Circuit] case law, which requires [the Court] to assess  
23 whether there are outstanding issues requiring resolution *before* considering whether to hold [the

1 improperly discredited evidence] credible as a matter of law.” *Treichler v. Comm’r of Soc. Sec.*  
2 *Admin.*, 775 F.3d 1090, 1105 (9th Cir. 2014); *see also Garrison v. Colvin*, 759 F.3d 995, 1019  
3 (9th Cir. 2014) (court may remand for benefits only “where there are no outstanding issues that  
4 must be resolved” (internal quotation marks and citation omitted)). Plaintiff makes no effort to  
5 address whether outstanding issues requiring resolution remain, and the Court concludes they do.  
6 For example, State agency doctors’ opinions conflict with Dr. Wingate’s and Ms. Armstrong’s  
7 opinions. *See* Tr. 189-91, 199-203. The Court concludes outstanding issues remain and,  
8 accordingly, remand for further proceedings is appropriate.

### 9 CONCLUSION

10 For the foregoing reasons, the Commissioner’s final decision is **REVERSED** and this  
11 case is **REMANDED** for further administrative proceedings under sentence four of 42 U.S.C.  
12 § 405(g).

13 On remand, the ALJ should reevaluate Plaintiff’s testimony, the lay witness testimony,  
14 and Dr. Wingate’s and Ms. Armstrong’s opinions; reassess the RFC as needed; and proceed to  
15 step five as necessary.

16 DATED this 21<sup>st</sup> day of May, 2020.

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20 RICARDO S. MARTINEZ  
21 CHIEF UNITED STATES DISTRICT JUDGE  
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